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POST-CONFIRMATION TRUST

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WAYNE BERRY, a Hawaii citizen) CIVIL NO. CV 03 00385 SOM LEK
) (Copyright)
Plaintiff,)
) THE POST-CONFIRMATION TRUST
vs.) FOR THE FLEMING COMPANIES,
) INC.'S MEMORANDUM IN
HAWAII EXPRESS SERVICE, INC., et) RESPONSE TO PLAINTIFF WAYNE
al.,) BERRY'S MOTION <i>IN LIMINE</i> TO
) EXCLUDE EVIDENCE OF THE
Defendants.) LOCATION OF ATLANTIC PACIFIC

) INTERNATIONAL, INC'S BUSINESS
) RECORDS
)
) DATE: January 20, 2006
) TIME: 2:00 p.m.
) JUDGE: Honorable Susan O. Mollway
Trial Date: January 24, 2006

THE POST CONFIRMATION TRUST FOR THE FLEMING COMPANIES,
INC.'S MEMORANDUM IN RESPONSE TO PLAINTIFF WAYNE BERRY'S
MOTION IN LIMINE TO EXCLUDE OF THE LOCATION OF ATLANTIC
PACIFIC INTERNATIONAL, INC'S BUSINESS RECORDS

Defendant the Post-Confirmation Trust for the Fleming Companies, Inc.
(“PCT”) by and through its attorneys, Kobayashi, Sugita & Goda, hereby responds
to PLAINTIFF WAYNE BERRY'S MOTION IN LIMINE TO EXCLUDE
EVIDENCE OF THE LOCATION OF ATLANTIC PACIFIC
INTERNATIONAL, INC'S BUSINESS RECORDS, filed January 3, 2006
(Plaintiff's “Motion re API Records”) as follows:

The issues left to be tried in the present case will pertain only to damages
arising from acts of copyright infringement which took place over a period from
April 1, 2003 to June 9, 2003. Atlantic Pacific International, Inc. (“API”) ceased
doing business in 1999. Any reference to API and/or its records is, therefore,
irrelevant to any remaining issue in this case, and Plaintiff should be prohibited
from referring to API entirely. The PCT's argument on this point is more
completely stated in the PCT's Motion in Limine No. 6 Regarding Unrelated Bad
Acts. See PCT's Motion in Limine No. 6 at 9. If Plaintiff is prohibited from

making any reference to API, there will be no need to address the location of API's records or the fact that Plaintiff has had sole possession and control of those records for at least the past five years.¹ To the extent that this Court grants the PCT's Motion in Limine No. 6, prohibiting Plaintiff from referring to or introducing evidence relating to, API, the PCT does not oppose Plaintiff's Motion re API Records. If, however, the Court is inclined to allow discussion of API at all, PCT respectfully requests that the Court permit it to raise before the jury, all API-related facts that may be relevant to PCT's defense, including but not limited

¹ Plaintiff also notes in his Motion, that "[u]pon information and belief, Fleming's management remains under criminal investigation . . ." Plaintiff's Motion re API Records at 1-2. What, if any, relation this allegation has to the subject of Plaintiff's Motion is entirely unclear. However, whatever Plaintiff's point may be in making this reference, it is clearly irrelevant to the subject of damages to be tried in this case, and Plaintiff should be prohibited from referring to or introducing evidence related to this allegation at trial.

to the location and custodian of API's records.

Dated: Honolulu, Hawaii, January 10, 2006.

KOBAYASHI, SUGITA & GODA

/s/ Thomas H. Yee

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